

SUPREME COURT OF NIGERIA
6TH JUNE, 1995. SC. 184/1993
CORAM:- I.L. KUTIGI, E.G. OGWUEGBU,
U. MOHAMMED, Y.O. ADIO, A.I. IGUH, JJSC.

DIALA AMAKO APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW- *Self-defence - Murder - Whether the defence avails the appellant.*

CRIMINAL LAW- *Provocation - Murder -When the defence of provocation is held not available to appellant.*

CRIMINAL PROCEDURE - *Charge - Amendment thereto - Need to comply with s. 164 of the CPA.*

CRIMINAL PROCEDURE - *Arraignment for trial - Whether appellant was properly arraigned - After amendment of the charge.*

FACTS

The appellant, who was a member of the Amako family, had earlier in the morning complained that some members of the family (not the deceased) have harvested his cassava and if payment of the value of same was not made to him, that heads will roll. He was alleged to have in the afternoon of the same day struck the head of one CELINA AMAKO (deceased) with machete. She died on the spot. The appellant thereafter went to his father's house, saw him, and also dealt several machete cuts on him. The appellant's father also died on the spot. The appellant then lodged a complaint at the Police station that some unnamed person assaulted him. It was later that the murder of the deceased by the appellant became known. The appellant was arrested and charged with the murder of the deceased and his (appellant's) father at the High Court of Justice Owerri. However, for reasons of procedural error, the charge for murder of the appellant's father was dropped while that for the murder of the deceased subsisted from trial to the present appeal.

The learned trial judge found the appellant guilty of the murder as charged, rejected his defence, convicted and sentenced him to death. Dissatisfied with the judgment of the trial judge, the appellant appealed to the court of Appeal, which court, dismissed the appeal and affirmed the judgment of the trial court. The appellant has further appealed to the apex court raising three issues for determination, which issues, the Supreme Court accepted as sufficient for the disposition of the appeal.

ISSUES FOR DETERMINATION:

“(1) Whether the appellant was properly arraigned after the amendment

of the charge

(2) If the answer to issue (1) above is in the negative, 'whether there was substantial compliance with the procedure prescribed by law in relation to amendment or alteration of a charge.

(3) Whether the Court of Appeal was justified in affirming the sentence of death imposed on the appellant. “

HELD (Unanimously dismissing the appeal per lead judgment of **ADIO JSC**)

Charge - Amendment thereto

1. Compliance by the court strictly with the provisions of section 164 of the Criminal Procedure Act, quoted above, is essential. Therefore, failure to request the accused to plead to the amended charge will result in the whole proceedings being declared null and void. The learned trial Judge was conscious of the provisions of the section and he also complied with them.
(p. 1248 A)

Arraignment for trial

2. The appellant was properly arraigned after the amendment of the charge. The court below was right in affirming the procedure followed by the learned trial Judge after the amendment of the charge. It should be noted, in the present connection, that while sections 164 and 165 of the Criminal Procedure Act are designed to afford an accused person adequate safeguards in the event of an amendment under sections 162 and 163, it is clearly never the intention of the Act that these sections should provide an accused with a gratuitous escape route to freedom in the face of overwhelming evidence. (p. 1250 C)

3. Self-defence

The defence of self-defence was not available to the appellant, in the circumstances of this case, as the deceased did not attack the appellant or engage in any confrontation with the appellant. (p. 1251 B)

4. Provocation

Also, provocation, as a defence, was not available to the appellant as it was not the deceased that engaged in the throwing of stones or sticks at each other with the appellant. Provocation offered by one person to an accused is not a valid legal basis for the accused to kill another person who did not offer such provocation. (p. 1251 B)

NOTABLE POINTS OF INTEREST

ADIO JSC

1. Discretion of trial court - Rarely to be interfered with

Where a matter is a question of the exercise of discretion, an appellate court will rarely, if at all, interfere with the decision of the trial court and the appellate court

is not entitled to substitute its own discretion for that of the trial court.
(p. 1248 E)

2. Failure to record that charge was read and explained - Effect

If, from all the circumstances of a case, it can reasonably be said that the charge preferred against an accused was read and explained to him in the language that he understood before he was asked to plead and that he understood the charge before making his plea, the mere fact that the learned trial Judge did not record the name and designation of the officer of the court who read and explained the charge to the accused in the language that the accused understood or did not make a note on the record that the charge was read over and explained to the accused to his (Judge's) satisfaction cannot be fatal to the proceedings; they are mere technicalities. (p. 1248 H)

OGWUEGBU JSC

3. Recalling of witnesses - Duty of counsel or trial judge

It is the duty of the prosecuting counsel and the defence counsel where the parties are represented by counsel as in this case, to make the necessary application under section 165 and the court shall allow them recall or re-summon any witness who might have been examined and examine or cross-examine such witness with reference to the alteration of the charge. Where both parties or one of them is not represented by counsel, the duty becomes that of the trial judge to ensure that section 165 of the Act is complied with. (p. 1254 D)

IGUH JSC

4. Validity of plea - What to record

The first point that must be stressed is that it does not appear to me to be the law that for the plea of an accused person to be valid, the trial court must record the name and title or designation of the officer of the court who read over and explained or interpreted the charge or information or the amended charge or information to the accused person in a language that he understood. No doubt, a charge or information pursuant to section 215 of the Criminal Procedure Act shall be read over and explained to an accused person to the satisfaction of the court by the Registrar or any other officer of the court. It is however not the provision of that section of the law that the trial court must record the full names or designation of the officer of the court who read over the charge or information to the accused person before an arraignment may be regarded as legally valid. (p. 1256 G)

5. Defence of insanity - Onus on the accused

On the defence of insanity, the general rule is that every person is presumed to be

of sound mind, and to have been of sound mind, at any time which comes in question until the contrary is proved. An accused person who contends that he is insane or, indeed, that he suffers from insane delusion, has the duty to rebut this presumption of law which regards him as sane until the contrary is proved. The onus therefore rests on him to prove insanity or insane delusion. See Section 140(3) (c) of the Evidence Act. This burden on the accused person, however, is merely as in civil cases, that is to say, on the balance of probability or the preponderance of evidence. (p. 1258 E)

REPRESENTATION:

- C Alhaji F. A. Oso for the appellant.
L. Uzoukwu Esq., Attorney-General, Imo State with
Mr. J.C. Duru, D.D.P.P., Imo State for the respondent.

CASES REFERRED TO

- D R. v. Kano (1951) 20 N.L.R. 32
R. v. Eronini (1953) 14 W.A.C.A. 366
Ogba v. The State (1992) 2 N. W.L.R. (Pt. 222) 164
Onwuguzo v. Commissioner of Police (1960) 4 E.N.L.R. 9
Shoage v. R. (1952) 14 W.A.C.A. 22
E Police v. Echeazu (1974) 2 S.C. 55
Nwede v. The State (1985) 12 S.C. 32
Ukwunnanyi v. The State (1989) 4 N. W.L.R. (Pt. 114) 131
Akan v. The State (1994) 9 W.N.L.R. (R. 368) 347
Shoaga v. The King (1952) 14 W.A.C.A 22 at 23
Kajubo v. The State (1988) 1 N. W.L.R. (Part 73) 721 at 738-739
F Josiah v. The State (1995) 1 N. W.L.R. (Part 373) 507
Ewe v. The State (1992) 6 N. W.L.R. (Part 246) 147
Omoargegbe v. The State (1977) 3 F.C.A. 151
Onwe v. The State (1975) 9-11 S.C. 23
Kau v. The Queen (1955) A.C. 206
G R. v. Oshubiyi (1961) 1 All N.L.R. 453

STATUTES REFERRED TO

- Criminal Code s. 319
Criminal Procedure Act ss. 64, 65, 215, 164, 165, 163, 162
H Evidence Act s. 73

LEAD JUDGMENT BY ADIO JSC

The charge preferred against the appellant was murder contrary to section 319 of the Criminal Code, Cap. 30 of the Laws of Eastern Nigeria 1963 applicable in Imo State. The allegation was that he, the appellant, on the 11th day

of October, 1980, at Umuohuru Ife Mbaise in the Owerri Judicial Division of the High Court of Justice of the Imo State of Nigeria, murdered Celina Amako (f).

In the morning of the 11th day of October, 1980, at Amako compound, the appellant, who was a member of Amako compound, was seen by the PW4 within the compound. The PW4, who was an uncle of the appellant, heard the appellant when he (appellant) was bitterly complaining that one Catherine Amako and one Alerick Amako had harvested his cassava from his farm. The appellant threatened that if the two named persons did not pay him the equivalent in money of what the cassava was worth, heads would roll on that day. B

Soon after the alleged threat made by the appellant, he got hold of a matchet in one hand and a stick in the other. While the PW2 was watching the appellant from a hide-out near the scene of the incident, the appellant met the deceased and struck her on the head with the matchet. The deceased fell down and died on the spot. The appellant then went to the house of his father. He saw him and struck him on the head with the matchet several times. The appellant's father too died on the spot. The appellant then went to the police station in the area and lodged a report of an alleged assault on him by some persons that he did not name. What he had earlier done to the deceased and to his own father later became known. He was arrested and charged with murder. There was allegation that the appellant used to smoke Indian hemp and that whenever he did so he used to be aggressive. However, on the day in question he did not smoke Indian hemp. C D E

The murder of the deceased and the murder of the appellant's father were the subject of one count in the charge. The error was realised but what was done was to make the murder of the deceased the subject of one Count and the murder of the appellant's father the subject of another count. Eventually, and before the end of the address, the learned counsel for the prosecution, with the leave of the court, withdrew the count relating to the murder of the appellant's father. Thus, it was the charge relating to the murder of the deceased that subsisted from the commencement of the trial till the end. The appellant denied the charge. F G

The learned trial Judge, after due consideration of the totality of the evidence before him and the submissions of the learned counsel for the parties, found the appellant guilty of the murder of the deceased. He rejected the defence of the appellant and held that the usual defences were not available to him. He convicted the appellant and sentenced him to death. Dissatisfied with the judgment of the learned trial Judge, the appellant lodged an appeal to the Court of Appeal which affirmed the judgment of the learned trial Judge and dismissed the H

appellant's appeal. The appellant was dissatisfied with this judgment of the court below and has lodged a further appeal to this court.

The parties duly filed and exchanged briefs. The appellant identified three issues for determination in his brief while the respondent too identified three issues for determination in its brief. The three issues identified for determination in the appellant's brief, which were similar to those in the respondent's brief, are sufficient for the determination of this appeal.

They are as follows:-

(1) Whether the appellant was properly arraigned after the amendment of the charge.

(2) If the answer to issue (1) above is in the negative, whether there was substantial compliance with the procedure prescribed by law in relation to amendment or alteration of a charge.

(3) Whether the Court of Appeal was justified in affirming the sentence of death imposed on the appellant".

There was no dispute on the question whether the charge originally preferred against the appellant was amended or altered during the trial of the appellant. The complaints of the appellant related to things which were allegedly done or not done after the amendment of the charge. It was submitted, in the appellant's brief, that after the charge had been amended there were certain requirements prescribed by sections 64 and 65 of the Criminal Procedure Act which must be complied with. In this connection, they are as follows:-

"(a) Who read the count and explained it to the accused/appellant in both English and Igbo languages?

(b) Was the interpreter/reader the registrar of the court or any other officer of the court as prescribed by Section 215 of the Criminal Procedure Act?

(c) Is there any thing on record on Page 52 lines 1- 9, showing that the accused/appellant understood the charge to the satisfaction of the court before his plea of not guilty was recorded?

(d) Was there anything on record on Page 52 showing that the accused wanted an adjournment instead of the continuation of the trial?"

After setting out the foregoing questions, it was submitted for the appellant, in the appellant's brief, that the answer to each of the question was in the negative. It was also submitted that in the absence of substantial compliance with the provisions applying to amendment of a charge and subsequent arraignment of an accused, the whole proceeding was a nullity and the affirmation of it by the court below was also a nullity. After citing *Ewe v. The State* (1992) 6 N.W.L.R. (Pt. 246) 147 at p. 152, the learned counsel for the respondent urged this court, in

the respondent's brief, to hold that the procedure adopted by the learned trial Judge after granting the amendment was substantially in conformity with the provision of Section 215 of the Criminal Procedure Act and also satisfied the principles enunciated in Ewe's case, *supra*. This court was also urged to take judicial notice under Section 73 of the Evidence Act of the fact that charges against accused persons in court of law were usually read by registrars or clerks of court. In particular, the attention of this court was drawn to the recording made by the learned trial Judge of what happened after the amendment of the charge had been granted. The respondent submitted that there was compliance with the necessary statutory provisions if the amended charge was, as it was in this case, read and explained to the appellant in Igbo language, which was a language that the appellant understood, and the appellant pleaded not guilty to the amended charge. With reference to the question whether the appellant wanted an adjournment immediately after the granting of the amendment to the charge, the respondent contended that the learned trial Judge rightly and properly exercised his discretion having regard to the fact that his reason for adjourning the case was to avoid prejudice to the prosecution and the defence, that is, counsel for each of the parties was new. Finally, it was submitted for the respondent that the appellant was given the opportunity to call or recall witnesses after the granting of the amendment of the charge, it was the learned counsel for the appellant that refused to call or recall any witness. B
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The court has power, under Section 163 of the Criminal Procedure Act to alter or add to any charge before judgment is given and every such alteration or addition must be read and explained to the accused. See also *R. v. Kano & Anor.* (1951) 20 N.L.R. 32. The procedure on alteration of a charge as prescribed by Section 164 of the Criminal Procedure Act is set out under sub-sections (1), (2) (3) and (4) thereof. The provisions of the section are as follows:- E

"(1) If a new charge is framed or alteration made to a charge under the provisions of Section 162 or Section 163 the court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered charge. F

(2) If the accused declares that he is not ready the court shall consider the reasons he may give and if proceeding immediately with the trial is not likely in the opinion of the court to prejudice the accused in his defence or the prosecutor in his conduct of the case the court may proceed with the trial as if the new or altered charge had been the original charge. G

(3) If the new or altered charge is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor the court may either direct a new trial or adjourn the trial for such period as the court may consider necessary. H

(4) Where a charge is so amended, a note of the order for amendment shall be endorsed on the charge, and the charge shall be treated for the purpose

of all proceedings in connection therewith as having been filed in the amended form."

Compliance by the court strictly with the provisions of Section 164 of the Criminal Procedure Act, quoted above, is essential. Therefore, failure to request the accused to plead to the amended charge will result in the whole proceedings being declared null and void. See *R. v. Eronini* (1953) 14 W.A.C.A. 366. The learned trial Judge was conscious of the provisions of the section and he also complied with them. The following was the note which he made in the record: "

Court: The only remaining count in the information i.e., the 2nd count is read and explained to the accused in English and Igbo. The accused pleads not guilty.

The court observes that the counsel for the prosecution and that for the defence are new to the case. It is necessary to grant a short adjournment to enable the two counsel handling the case to appear: Mrs. Njemanze and Dr. Aguwa have been directed to inform Mr. Acholonu and Mr. Onyeliike respectively. Adjourned to 14/6/84 for completion."

Mr. Onyeliike and Mr. Acholonu were the learned counsel who had been appearing and conducting the case for the prosecution and the defence, respectively, up to the stage when the application for the amendment of the charge was made. On the day that the learned trial Judge read his ruling, the learned counsel who appeared for the prosecution and the defence were Dr. Aguwa and Mrs. Njemanze, respectively. The adjournment granted by the learned trial Judge, after reading his ruling granting the amendment of the charge, was in proper exercise of his discretion and the court below was right in affirming it and in not interfering with it. Where a matter is a question of the exercise of discretion, an appellate court will rarely, if at all, interfere with the decision of the trial court and the appellate court is not entitled to substitute its own discretion for that of the trial court. See *Adejumo v. Ayantegbe*; (1989) 3 N. W.L.R. (Pt. 110) 417 at p. 445.

The note made by the learned trial Judge, quoted above also showed that he requested the appellant to plead. The plea of the appellant was made after the amended charge had been read and explained to him (appellant) in English and Igbo. It was not the case of the appellant that the appellant did not understand Igbo or that the amended charge was not read and explained to the appellant in Igbo and English. Above all, the appellant was represented by a learned counsel who appeared for him at the material time. If, from all the circumstances of a case, it can reasonably be said that the charge preferred against an accused was read and explained to him in the language that he understood before he was asked to plead and that he understood the charge before making his plea, the mere fact that the learned trial Judge did not record the name and designation of the officer of the court who read and explained the charge to the accused in the

language that the accused understood or did not make a note on the record that the charge was read over and explained to the accused to his (Judge's) satisfaction cannot be fatal to the proceedings; they are mere technicalities. The real purpose of the provisions of sections 163, 164, 165, 215 and any other sections of the Criminal Procedure Act relating to taking of plea of an accused on a charge or amended charge is to enable the accused to understand the nature of the charge or amended charge preferred against him. That was the fundamental or essential requirement or thing. There is no provision, in any of the aforesaid sections, requiring that a note should be made in the record of proceedings of the name, designation or other particulars of the person who read and explained the charge or amended charge to the accused in the language understood by the accused or requiring the learned trial Judge to make a note that the reading and explanation of the charge or amended charge to the accused was done to his (Judge's) satisfaction. Cases should be decided, wherever possible, on merit. They should not be decided on the basis of technicalities. See Akpan v. The State, (1992) 6 N.W.L.R. (Pt. 248) 439, and Effiom v. The State, (1995) 1 N.W.L.R. (Pt. 373) 507 at p. 620. If there is no miscarriage of justice, there is a presumption that the trial of the appellant was regular and since there was no statutory requirement that a note should be made on the record of proceedings about the aforesaid matters, the absence of any note on them in the record does not mean that the amended charge was not read and explained to the appellant in the language that he understood or that he did not understand the amended charge before he pleaded not guilty to it. See Ogba v. The State, (1992) 2 N.W.L.R. (Pt. 222) 164.

With reference to the recall of witnesses after the amendment of the charge was granted, the position here too was that the learned trial Judge was conscious of the provision of Section 165 of the Criminal Procedure Act and that he complied with it. Section 165 of the Act provides as follows:-

"165. When a charge is altered by the court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or resubmit any witness who may have been examined and examine or cross-examine such witness with reference to such alteration."

In compliance with the provision of Section 165 of the Criminal Procedure Act, the learned trial Judge gave opportunity to the appellant to recall any witness who had earlier testified in the case but the learned counsel for the appellant declined. The following was the note which the learned trial Judge made on that aspect of the matter:-

"Mr. E. O. Acholonu says he does not intend to get any witness recalled for cross-examination or the accused for further examination, but he wants to address the court further consequent upon the court's ruling granting an amendment of the information."

If an accused is not legally represented by counsel, he has to be told of his right to recall and cross-examine witnesses. Where the accused is represented by counsel, it is assumed that the counsel is aware of the rights of the person whom he represents and he (counsel) need not be told. See *Onwuguzo v. Commissioner of Police* (1960) 4 E.N.L.R. 9; and *Bisiriye Shoga v. R.* (1952) 14 B W.A.C.A. 22.

The conclusion to which I have come is that the answer to the question raised under the first issue is in the affirmative. In the circumstances, it is not necessary to consider or deal with the question raised under the second issue. C The appellant was properly arraigned after the amendment of the charge. The court below was right in affirming the procedure followed by the learned trial Judge after the amendment of the charge. It should be noted, in the present connection, that while Sections 164 and 165 of the Criminal Procedure Act are designed to afford an accused person adequate safeguards in the event of an amendment under sections 162 and 163, it is clearly never the intention of the D Act that these sections should provide an accused with a gratuitous escape route to freedom in the face of overwhelming evidence. See *Police v. Echeazu* (1974) 2. S.C. 55.

With reference to the question raised under the third issue, Ndoma- E Egba, J.C.A., gave consideration to the way the learned trial Judge evaluated the evidence. He pointed out that the vital aspects of the case were meticulously and fairly appraised and that the conclusions of the learned trial Judge Were based on proper and full assessment of the relevant facts. He concluded by saying that the judgment appealed from did not rest on any speculation but on the evidence presented before the learned trial Judge. It was argued, in the appellant's brief, F that the opinion expressed above by Ndoma-Egba, J.C.A., was erroneous on two grounds. In the first place, there was evidence before the trial court by PW3 and in Exhibit "A" that the appellant and PW2 were throwing stones and sticks at each other. Secondly, the PW3 said that the deceased had collected palm wine and was about to go and sell it when the appellant was pursuing one Chiwoke (appellant's Brother) with a machet and both of them were throwing stones and G sticks at each other. Chiwoke eventually ran away from the appellant. The contention was that the alleged evidence of PW3 mentioned above was not considered by the learned trial Judge and the court below. The submission made by the respondent was that the alleged encounter involving the throwing of stones and sticks was not between the appellant and the deceased. It was pointed out by the H respondent that the appellant did not rely on the defence of accident, provocation or self-defence. It was submitted that it was not justifiable or excusable for the appellant, in the circumstances of this case, to kill the deceased.

There is substance in the submissions made for the respondent. In order to rely on the defence of self-defence, there must be evidence that the life of the accused was so much endangered by the act of the deceased that the only means of escape from imminent death was to kill the deceased. See *Nwede v. The State* (1985) 12 S.C. 32; (1985) 3 NWLR (Pt. 13) 444. The defence of self-defence was not available to the appellant, in the circumstances of this case, as the deceased did not attack the appellant or engage in any confrontation with the appellant. Also, provocation, as a defence, was not available to the appellant as it was not the deceased that engaged in the throwing of stones or sticks at each other with the appellant. Provocation offered by one person to an accused is not a valid legal basis for the accused to kill another person who did not offer such provocation. See *Ukwunmenyi v. The State* (1989) 4 N.W.L.R. (Pt. 114) 131. It was Chinwoke who allegedly engaged in throwing of stones and sticks at each other with the appellant and not the deceased. Even if one regards throwing of sticks and stones at each other as an act of provocation the use of a matchet by the appellant in the circumstances, was out of proportion. Where the injury inflicted for a slight transgression is outrageous and out of proportion, the defence of provocation will not be available to the accused. See *Akpan v. The State* (1994) 9 N.W.L.R. (Pt. 368) 347. It is also clear that the circumstances of this case show that the appellant could not rely on the defence of accident. Above all, the appellant told the trial court that he was not mad. He said further as follows:-

"Nobody attacked me on the morning of 1/10/80 in our compound. I did not tell the police that anyone attacked me or that I defended myself with my matchet."

The answer to the question raised under the third issue is in the affirmative. The court below justifiably confirmed the sentence of death passed on the appellant.

The appeal lacks merit. The judgment of the court below affirming the conviction of and the sentence of death passed on the appellant is hereby affirmed. The appeal is accordingly dismissed.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother Adio J.S.C. I agree with his conclusion that the appeal lacks merit and it is hereby dismissed. The judgments of the lower courts are accordingly affirmed.

OGWUEGBU JSC

I had a preview of the judgment just delivered by my learned brother Adio, J.S.C. I agree entirely with his reasoning and conclusion. The first issue for determination deserves my comments, at least, for the purpose of emphasis. This is:

"Whether the appellant was properly arraigned after the amendment of

the charge.”

Learned counsel for the appellant submitted that the power of the court to amend, substitute, and alter a charge or information before it at anytime before final judgment is never in doubt. He however contended that the court must comply with Sections 162, 163, 164 and 215 of the Criminal Procedure Act and that *“by virtue of Section 165 of the CPA it becomes a duty and responsibility of the trial court of its right to recall or resummon any witness who may have given evidence with a view to re-examine or cross-examine as the case may be.”*

He further submitted that the said provisions of the Criminal Procedure Act were not complied with and the court below affirmed the proceedings of the learned trial Judge which were null and void.

After the learned trial Judge had granted the application of the prosecution to amend the charge by withdrawing the first count in the information and discharging the appellant on that count, the minutes of the record of proceedings read thus:

“Court: The only remaining count in the information i.e., the second count is read and explained to the accused in English and Igbo. The accused pleads not guilty.

The Court observes that the counsel for the Prosecution and that for the defence are new to the case. It is necessary to grant a short adjournment to enable the two counsel handling the case to appear. Mrs. Njemanze and Dr. Aguwa have been directed to inform Mr. Acholonu and Mr. Onyelike respectively. Adjourned to 14:6:84 for completion.

(Sgd): I. C. E. Ihejetoh (Judge)
21:5:84)”

The case suffered two adjournments before 24:7:84 when Mr. Onyelike for the prosecution and Mr. Acholonu for the accused were present. On this date the record of proceedings showed:

“Accused present.

C. I. Onyelike for the State

E. O. Acholonu for the accused.

Mr. E. O. Acholonu says he does not intend

to get any witness recalled for cross-examination or the accused for further examination; but he wants to address the Court further c

onsequent upon the Courts ruling granting an amendment of the information.

Court: Mr. Acholonu is granted permission to further address the court as requested.”

From the above notes of the record of proceedings, it cannot be seri-

ously contended by the appellant's counsel that there was non compliance with the provisions of Sections 164, 165 and 215 of the Criminal Procedure Act. It is not disputed that the appellant understands Igbo language. The statement of the appellant to the police was in Igbo language and this was tendered in evidence as Exhibit "F". The English translation was tendered and admitted as Exhibit "F1". The amended charge was read and explained to the appellant in Igbo before he pleaded "not guilty" to it.

B

Sections 164 and 165 provide:

"164(1) If a new charge is framed or alteration made to a charge under the provisions of Section 162 or Section 163 of this Act the court shall forthwith call upon the accused to plead thereto and to state whether he is ready to be tried on such charge or altered charge.

C

(2)

(3) If the new or altered charge is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor the court may either direct a new trial or adjourn the trial for such period as the court may consider necessary.

D

(4)

"165. When a charge is altered by the court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or resummon any witness who may have been examined and examine or cross examine such witnesses with reference to such alteration".

E

"215. The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto.

F

Any charge or information is by law required to be read over and explained to the accused person by the registrar or other officer of the court, usually, called the clerk of court.

G

We have been invited by the learned respondent's counsel in his brief of argument to take judicial notice of Section 74(1)(m) of the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 which provides:

*"74(1) The court shall take judicial notice of the following facts:-
(m) the course of proceedings and all rules of practice in force in the High Court of Justice in England and in the High Court of a State and the Federal Capital Territory, Abuja and in the Federal High Court."*

In the absence of anything on the fact of the record of proceedings that the person who read over and explained the amended charge to the appellant was not the registrar or other officer of the court, I must hold that there was

substantial compliance with Section 215 of the Criminal Procedure Act and that the charge as amended was infact read over and explained to the appellant by an officer of the court.

The complaint of the appellant that Sections 164, 165 and 215 Cap. 80 Laws of the Federation of Nigeria, 1990 were not complied with is baseless. The learned trial Judge realised that the learned counsel appearing for the prosecution and that for the appellant were absent on the day he read his ruling granting the application to amend the information. After the amended charge was read over and explained to the appellant, he adjourned the case to enable both counsel to appear.

This adjournment was in compliance with Section 164(3) of the Criminal Procedure Act and when both counsel appeared on 24:7:84, the learned counsel for the appellant informed the court that he did not intend to recall any witness for cross-examination or the accused for further examination. This is also in compliance with Section 165 of the Criminal Procedure Act. It is the duty of the prosecuting counsel and the defence counsel where the parties are represented by counsel as in this case, to make the necessary application under Section 165 and the court shall allow them recall or re-summon any witness who might have been examined and examine or cross-examine such witness with reference to the alteration of the charge. Where both parties or one of them is not represented by counsel, the duty becomes that of the trial judge to ensure that Section 165 of the Act is complied with. See *Shoaga v. The King* (1952) 14 W.A.C.A. 22 at 23.

The provisions of the Criminal Procedure Act dealing with amended charge or information were substantially complied with by the learned trial judge. The appeal is devoid of any merit. I, too, dismiss the same for the above reasons and the fuller reasons contained in the judgment of my learned brother Adio, J.S.C. The judgment of the court below affirming the conviction and sentence of death imposed on the appellant is hereby affirmed.

G **MOHAMMED JSC**

I entirely agree that this appeal has failed for the reasons given in the lead judgment written by my learned brother, Adio, JSC. I have nothing more to add. Accordingly, I too, hereby dismiss the appeal and agree with the Court of Appeal in affirming the conviction and sentence passed on the appellant by the trial High Court.

IGUH JSC

I have had the advantage of a preview of the lead judgment just delivered by my learned brother, Adio, J.S.C., and I agree entirely with the reasoning

and conclusions therein.

On the first and second issues, the appellant's contention is that there was no compliance with the provisions of sections 164, 165 and 215 of the Criminal Procedure Act on the amendment of the information before the trial court. It was therefore argued on his behalf that this irregularity rendered the conviction and sentence of the appellant null and void. B

This court has on several occasions spelt out the three requirements which all together constitute condition sine qua non for a valid plea or arraignment of an accused person pursuant to the provisions of Section 215 of the Criminal Procedure Act. For the avoidance of doubt, these requirements are as follows:- C

(i) The accused person shall be placed before the court unfettered, unless the court shall see cause otherwise to order.

(ii) The charge or information shall be read over and explained to the accused person to the satisfaction of the court by the Registrar or other officer of the court, and D

(iii) Such accused person shall then be called upon to plead instantly thereto, unless, where he is entitled to service of the information, he objects to the want of such service, and the court finds that he has not been duly served therewith. E

See Sunday Kajubo v. The State (1988) 1 N.W.L.R. (Part 73) 721 at 738-739, Josiah v. The State (1985) 1N.W.L.R. (Part 1) 125 at 141, Edet Effiom v. The State (1995) 1 N.W.L.R. (Part 373) 507, Akpiri Ewe v. The State (1992) 6 N.W.L.R. (Part 246) 147 etc. F

The power of the court to amend or alter a charge or information is not in doubt. See Sections 162 and 163 of the Criminal Procedure Act. Section 164 of the Act provides that if an amendment to a charge or information is made by the court, the amended charge shall forthwith be read to the accused person who inter alia shall be called upon to plead thereto. Under Section 165 of the same Act, it is the duty of a trial court, after an amendment and after an accused person has pleaded to such an amended charge to inform him of his right to recall any witnesses he might wish to be recalled for further examination or cross-examination. G

In the present case the learned trial Judge after the information before the court was amended on the application of the prosecution recorded thus - H

"Court - The only remaining count in the information i.e., the 2nd count is read and explained to the accused in English and Igbo. The accused pleads not guilty.

The court observes that the counsel for the prosecution and that for the defence are new to the case. It is necessary to grant a short adjournment to enable

the two counsel handling the case to appear. Mrs. Njemanze and Dr. Aguwa have been directed to inform Mr. Acholonu and Mr. Onyelike respectively.

Adjourned to 14/6/84 for completion.

(Sgd.) I. C. E. Ihejeto (Judge).

21/5/84"

B

On the appearance of Messrs Acholonu and Onyelike as directed by the trial court, the learned trial Judge recorded as follows:

"Mr. E. O. Acholonu says he does not intend to get any witness recalled for cross-examination or the accused for further examination; but he wants to address the court further consequent upon the court's ruling granting an amendment of the information.

Mr. Onyelike - No objection.

Court: Mr. Acholonu is granted permission to further address the court as required."

D

A close study of the record of proceedings discloses in very clear terms that the amended information was read over and explained to the appellant in both the English and Igbo languages immediately after the amendment was made. There is nothing on the face of the records to suggest that the appellant at the time of his arraignment on the amended information was fettered. It is also clear that the appellant pleaded not guilty to the amended information after the same was read over and explained to him to the satisfaction of the court. His learned counsel, as he was entitled to do, indicated to the trial court after the amendment but before the continuation of the trial that the appellant did not wish to recall any of the witnesses for further examination. In my view, the appellant was properly and validly arraigned on the amended information as there was substantial compliance with the relevant provisions of the law on the amendment of a charge or information and on the plea of the appellant to the said amended information.

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It was further contended on behalf of the appellant that it is not indicated from the records the official that read over and explained the amended charge to the appellant. Learned appellant's counsel then submitted that failure by the trial court to do this is fatal to the appellant's plea to the amended charge.

H

The first point that must be stressed is that it does not appear to me to be the law that for the plea of an accused person to be valid, the trial court must record the name and title or designation of the officer of the court who read over and explained or interpreted the charge or information or the amended charge or information to the accused person in a language that he understood. No doubt a charge, or information pursuant to Section 215 of the Criminal Procedure Act shall be read over and explained to an accused person to the satisfaction of the court by the Registrar or any other officer of the court. It is however not the

provision of that section of the law that the trial court must record the full names or designation of the officer of the court who read over the charge or information to the accused person before an arraignment may be regarded as legally valid.

In the second place, it is a maxim of law that *omnia praesumuntur rite, et solemniter esse acta donec probetur in contrarium*” or for short, *omnia praesumuntur rite esse acta* upon which ground it will be presumed, even in criminal cases, that one who has acted in an official capacity was duly appointed and did rightly and regularly discharge his official duties. This common law presumption of regularity is mainly applied to judicial and official acts and although sometimes conclusive, it is in general only rebuttable. B

It cannot be disputed, indeed., I think I am entitled, pursuant to the provisions of Sections 73 and 74 (m) of the Evidence Act, to take judicial notice of the course of proceedings and all rules of practice in the High Court of Justice of a State. Under these rules of practice, and the course of proceedings in the High Courts, charges and information’s, without doubt, and as a matter of practice, are read over and explained to accused persons at the time of their arraignment by the Registrars or Clerks of the High Courts of Justice before they are called upon to plead thereto. There is nothing on the face of the record of proceedings in the present case to suggest that the amended information was read over and explained to the appellant by any person other than the said Registrar or the Clerk of the trial court. It has not even been contended on behalf of the appellant that the amended information was read over and explained to him by any other person else other than the said Registrar or Clerk of the trial court. C D E

In my view, there is in the present case, a strong presumption of law, albeit, not irrebuttable, that it was the Registrar or the Clerk of the trial court that read over and explained the amended information to the appellant pursuant to the provisions of Section 164(1) of the Criminal Procedure Act. It seems to me that this presumptiones juris in favour of regularity and/or constitutionality throws the burden of proof on the appellant who now appears to allege that the trial court was in breach of the provisions of Sections 164(1) and 215 of the Criminal Procedure Act in that the amended information was read over and explained to him by someone other than the Registrar or the Clerk of the trial court to establish the same. This burden of proof was neither discharged by the appellant nor was any attempt made to discharge it. I am therefore of the firm view that no infringement of the provisions of the said Section 164(1) and 215 of the Criminal Procedure Act has been established by the appellant in this case. It is also plain to me that the appellant was rightly and properly arraigned after the amendment of the information and that there was substantial compliance with the relevant provisions of the law on the required procedure after an amendment or alteration of an information by the court. F G H

The third issue poses the question whether the court below justifiably confirmed the conviction and sentence passed on the appellant. In this regard, the learned trial Judge after an exhaustive consideration and evaluation of the

entire evidence before him, found that in the morning of the 11th October, 1980, the appellant openly threatened that “*heads would roll in the Amako family*” if one Catherine Amako and Alerick Amako whom he accused with harvesting his cassava failed to pay him the monetary value of the cassava. Soon after the threat, the appellant picked up a matchet and stick and proceeded to the house of PW2 whose back door he violently banged at PW2, having observed the savage and bellicose mood of the appellant, escaped through his front door and hid himself. Not finding PW2 inside his house, the appellant rushed out and met the deceased whom, for no reason, he savagely attacked with his matchet. The deceased fell down in a pool of blood and died on the spot.

The trial court considered all the probable defences that might be available to the appellant and found none established. On the defence of provocation, the trial court found that this did not avail the appellant as the deceased offered him no provocation whatever.

Admittedly the onus is on the prosecution to disprove an accused person’s plea of self-defence and not on the accused person to establish this defence. The probable defence of self defence was ruled out as the prosecution established beyond doubt that the attack by the appellant against the deceased was not occasioned by way of self defence. See *Ahusimen Omoaregbe v. The State* (1977) 3 F.C.A.151, *Iteshi Onwe v. The State* (1975) 9-11 S.C. 23, *Chan Kai E v. The Queen* (1955) A.C. 206, *R. v. Oshunbiyi* (1961) 1 All N.L.R. 453 etc.

On the defence of insanity, the general rule is that every person is presumed to be of sound mind, and to have been of sound mind, at any time which comes in question until the contrary is proved. An accused person who contends that he is insane or, indeed, that he suffers from insane delusion, has the duty to rebut this presumption of law which regards him as sane until the contrary is proved. The onus therefore rests on him to prove insanity or insane delusion. See Section 140(3)(c) of the Evidence Act. This burden on the accused person, however, is merely as in civil cases, that is to say, on the balance of probability or the preponderance of evidence. See *R. v. Echem* 14 W.A.C.A. 158, *R. v. Onakpoya* (1959) SCNLR 384; 4 F.S.C. 150 and *Emeryi v. The State* (1973) 3 S.C. 215 at 226. The appellant did not establish this defence which the trial court ruled was unavailable to him.

There was finally the vague suggestion that the appellant was in the habit of smoking Indian hemp. There was however no evidence whatever that the appellant did smoke Indian hemp on the fateful morning. Even if infact he smoked Indian hemp that morning, and this was not established before the court, there was no evidence of proved incapacity in the appellant to form the intent necessary to constitute the offence of mur-

der for which he stood charged. This aspect of the defence is of vital importance as evidence of having smoked Indian hemp which had the effect of merely establishing that an accused person's mind was affected by the drug so that he more readily gave way to some violent passion does not rebut the legal presumption that a man intends the natural consequences of his act. See *R. v. Hansen Owarey* 5 W.A.C.A. 66, *DPP v. Beard* (1920) A.C. 479, *The State v. Njoku Obia* (1974) 4 E.C.S.L.R. 67, *R. v. Meakin* 7 C & P. 297, *Chutuwa v. The Queen* 14 W.A.C.A. 590 and *R. v. Mc Carthy* (1954) 2 .Q.B. 105. B

The finding of the learned trial judge to the effect that on the facts of the case, no legal defence was available to the appellant was affirmed by the Court of Appeal. I have myself carefully considered the evidence before the court and agree with the courts below that the appellant established no legal defence to his senseless and barbarous murder of the deceased. C

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Adio. J.S.C., that I, too, dismiss this appeal as unmeritorious and affirm the conviction and sentence of the trial court as affirmed by the court below. D

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